

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 11-11576-WGY

* * * * *
SECURITIES AND EXCHANGE *
COMMISSION, *

Plaintiff, *

v. *

JEFFREY LISKOV and EAGLEEEYE *
ASSET MANAGEMENT, LLC, *

Defendants. *

MOTION HEARING

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

SECURITIES & EXCHANGE COMMISSION (By Deena
R. Bernstein, Senior Trial Counsel and Naomi J.
Sevilla, Senior Enforcement Counsel), 33 Arch
Street, 23rd Floor, Boston, Massachusetts 02110,
on behalf of the Plaintiff

DUANE MORRIS LLP (By Albert P. Zabin,
Esq.), 100 High Street, Suite 2400, Boston,
Massachusetts 02210, on behalf of the Defendants

1 Courthouse Way
Boston, Massachusetts

September 19, 2012

1 **THE CLERK:** Now hearing Civil Matter 11-11576,
2 Securities & Exchange Commission v. EagleEye Assets.

3 **MS. BERNSTEIN:** Deena Bernstein and Naomi Sevilla
4 for the SEC.

5 **MR. ZABIN:** Albert Zabin for the defendants.

6 **THE COURT:** This is the SEC's motion and I should
7 call on them first.

8 How can you possibly get summary judgment here in a
9 case on which you bear the burden of proof?

10 **MS. BERNSTEIN:** Because we believe that no
11 reasonable jury -- because the standard is Anderson, the
12 Anderson and Matsushita --

13 **THE COURT:** Oh, isn't the more applicable case
14 Reeves v. Sanderson Plumbing? And in Reeves the Supreme
15 Court has said that I should disregard any fact that the
16 jury was entitled to disregard. So, unless they've made
17 admissions, unless your whole case is based upon their
18 admissions there's no way you can get summary judgment.
19 This may well be a winning case but not on summary judgment.

20 **MS. BERNSTEIN:** Your Honor, you're absolutely
21 right. So I decided to go back and look at our Local Rules
22 Statement and their opposition. Of 272 paragraphs in our
23 Local Rules Statement, 200 of them are from admissions of
24 the, of the defendants. His answer, responses to requests
25 to admit, and his own deposition. We don't rely on victims,

1 contrary to their opposition brief, we don't rely on victims
2 for any element at all. We rely on documentary evidence and
3 we rely on their own admissions.

4 By the way, also of 272 paragraphs, 200 of them are
5 not controverted. And the ones that are usually
6 controverted are ones where we just brought a victim in for
7 added evidence to prove materiality. But we would argue as
8 a matter of law based on the admissions and documents and
9 uncontroverted paragraphs of the Local Rules Statement that
10 we're entitled to summary judgment.

11 **THE COURT:** Well, on one of your claims here, and
12 maybe more than one -- which of these claims require
13 scienter?

14 **MS. BERNSTEIN:** Scienter's required for 206(1) and
15 the 10(b) claim. It is not required for 206(2) where we
16 would argue his own affidavit admitted that he wasn't wise,
17 he should have acted better. So he basically all conceded
18 negligence, which would be the 206 standard. And we also
19 have reporting requirements that require no scienter at all.

20 **THE COURT:** Well, I recognize you have reporting
21 requirements that require no scienter. But as to those that
22 require scienter he's entitled to a trial on that, isn't he?

23 **MS. BERNSTEIN:** Well, I would say that what he's
24 admitted to doing is enough that no reasonable juror could
25 come to a conclusion other than --

1 **THE COURT:** But you see that's contrary to Reeves.
2 That's why we have jury trials. This idea that somehow
3 judges are going to determine things that for as long as we
4 have had a Republic that juries decide does not commend
5 itself to me. No reasonable jury, where you bear the burden
6 of proof? Maybe they don't particularly like your
7 witnesses. They may not be --

8 **MS. BERNSTEIN:** Well, we would be relying on --

9 **THE COURT:** -- persuaded by those witnesses.

10 **MS. BERNSTEIN:** But we would be primarily
11 relying -- we would win on scienter without bringing a
12 single victim. We could, I mean literally, we could take
13 his own -- he admitted to whitening out documents and
14 submitting them to Fidelity.

15 **THE COURT:** Right.

16 **MS. BERNSTEIN:** And he's a fiduciary. He had a
17 duty to disclose all that.

18 **THE COURT:** All right.

19 **MS. BERNSTEIN:** He admitted that he didn't. He
20 also admitted that even after the fact he didn't provide
21 those documents to clients. He's admitted to the failure to
22 disclose on each and every, on almost everything we have
23 discussed in our brief. Those are his admissions. I would
24 think the case would try better with the victims. If I were
25 to try it, yes, we would bring the victims. But I could try

1 this case literally without a single victim, with just the
2 documentary evidence, which are documents that actually
3 exist, his own admissions, his own deposition.

4 **THE COURT:** I'm not telling you how to try the
5 case. You say you want to walk out of here this afternoon
6 having won the case. That's what I'm having some problem
7 with. And I would like to hear Mr. Zabin.

8 On scienter I have real problems. But there are
9 reporting requirements here. It doesn't look like your
10 fellow has reported in accordance with those requirements,
11 and it looks like that's clear beyond per adventure.

12 **MR. ZABIN:** Your Honor, what's clear is that he did
13 not comply with the recording requirements that he had, that
14 he had to follow. The only -- and those are quite detailed,
15 and I doubt very much if anybody follows them all.

16 I think, I think the problem that the Commission
17 has is they do not allege that any of the required
18 information that he's supposed to have was lacking. It's a
19 question of he didn't, he didn't put them in the, in the
20 form that's required. And for good reason. We don't
21 contend that his failure to, to do that was not sloppy. But
22 all that the Commission has to say is that they're not
23 confident that he revealed all the customers he had. Well,
24 their lack of confidence is not a statement of fact on which
25 it is entitled to summary judgment.

1 So, I think, you know, I think that's a minor part
2 of the case. If that's all there is left to this, to this
3 case, what are we fighting about? I mean --

4 **THE COURT:** Well, they bring you in here and I come
5 on the bench, but they've moved for summary judgment.

6 **MR. ZABIN:** Yes.

7 **THE COURT:** Are you saying summary judgment is
8 appropriate for them on Section 204 of the Investment
9 Advisers Act?

10 **MR. ZABIN:** What I'm saying is that it is not
11 because they don't allege that he didn't have the
12 information, they allege only essentially that it's not in
13 the form that it's required.

14 **THE COURT:** And your point is legally he's got to
15 have it, not that he's got to report it.

16 **MR. ZABIN:** That's correct. You know, that's --

17 **THE COURT:** I'm not sure that's the law.

18 **MR. ZABIN:** That is not the strongest part of our
19 case. And, you know, and that's, you know, admittedly it's
20 a close case. But I think, at least as I have read it, read
21 them, and to the extent I understand it, and I will not
22 pretend to have an expertise on interpreting those
23 regulations, the important thing is, particularly when it
24 comes to issues of sanctions, that the, that the investment
25 adviser is required to keep certain information to be sure

1 in a form that's, that's convenient for the regulatory
2 agencies. But there's no allegation that he didn't keep the
3 required information. That's, I mean, that's our point.
4 And I think that should be enough to withstand summary
5 judgment.

6 **THE COURT:** I understand your point.

7 His point is that in terms of your statement of
8 undisputed facts, you, you recite the investigation and
9 conclusion of the SEC, you don't state the underlying facts.
10 He's right on that.

11 **MS. BERNSTEIN:** Well, actually in the statement of
12 undisputed facts the person who was writing those
13 paragraphs, and if you look at the underlying affidavit, was
14 the one who went in on the exam. He was the one that saw
15 that documents were missing, that they weren't in the right
16 way. And that is the way the affidavit is written.

17 But I also want to go back to 206(2) which does not
18 require scienter. It is a negligence based. It is not a
19 scienter based. And it does not require scienter and it
20 would provide us with exactly the same relief as getting
21 206(1) and 10(b).

22 **THE COURT:** But negligence is a question for the
23 jury.

24 **MS. BERNSTEIN:** But he's admitted to negligence.
25 He's admitted to and in paragraphs --

1 **THE COURT:** He's admitted that he was sloppy.

2 **MS. BERNSTEIN:** And unwise.

3 **THE COURT:** And unwise.

4 **MS. BERNSTEIN:** And that he took shortcuts.

5 **THE COURT:** And took shortcuts.

6 **MS. BERNSTEIN:** And that's his own affidavit.

7 **THE COURT:** Yes.

8 **MS. BERNSTEIN:** Plus the entire totality of his
9 deposition, plus the totality of admitting that he altered
10 countless documents to Fidelity and to a commodities
11 brokerage. Countless documents.

12 **THE COURT:** You know, I recognize the strength of
13 your case. I just don't see that where you bear the burden
14 of proof I can grant summary judgment. Summary judgment's
15 denied.

16 Now, this case is about ready for trial; isn't that
17 right?

18 **MS. BERNSTEIN:** We are on the November 5th
19 calendar.

20 **MR. ZABIN:** Yes.

21 **THE COURT:** We'll call you for a final pretrial
22 conference.

23 Mr. Zabin, the case is an extraordinarily strong
24 case. They had a case very much like this before another
25 judge, and I don't criticize any other judge. They won

1 summary judgment. Don't think this is like out of the blue.
2 I'm very reticent about summary judgment. So, I imagine you
3 people will be talking.

4 All right. It's denied.

5 **MR. ZABIN:** Thank you, your Honor.

6 **THE COURT:** It stands for trial.

7 (Whereupon the matter concluded.)
8

9 **C E R T I F I C A T E**
10
11

12 I, Donald E. Womack, Official Court Reporter for
13 the United States District Court for the District of
14 Massachusetts, do hereby certify that the foregoing pages
15 are a true and accurate transcription of my shorthand notes
16 taken in the aforementioned matter to the best of my skill
17 and ability.
18
19
20

21 /S/ DONALD E. WOMACK 10-3-2012
22 -----

23 DONALD E. WOMACK
24 Official Court Reporter
25 P.O. Box 51062
Boston, Massachusetts 02205-1062
womack@megatran.com